

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: I 3455/2015

In the matter between:

EK

PLAINTIFF

and

EK

DEFENDANT

Neutral citation: *EK v EK* (I 3455/2015) [2018] NAHCMD 200 (3 July 2018)

Coram: PRINSLOO J

Heard: 19 March 2018

Delivered: 26 June 2018

Reasons: 03 July 2018

Flynote: Marriage — Custody of minor children — Considerations by court in awarding custody — Best interests of children paramount — Mother will not automatically be awarded custody — Award based on what would be in best interests of children.

Summary: The plaintiff instituted divorce proceedings against the defendant which in turn became defended. The main issues the court had to make a decision on, were the awarding of custody and the division of the joint estate. Although the breakdown of the marriage was also at issue, through evidence led by the parties, the circumstances revolving the breakdown became moot.

In respect of the custody of the minor children, the plaintiff made the point that he was in a generally better position to take care of the minor children whereas the defendant made the point that the plaintiff was merely using her mental condition to prove that she is unfit to be awarded custody of the minor children.

Held – through evidence led by the parties, it clearly transpired that the plaintiff was forced to move from the common home due constant psychological relapses suffered by the defendant, causing her times to become extremely violent towards the plaintiff.

Held further – the marriage was ‘irretrievably broken down’ and that there are no reasonable prospects for the resumption of a joint and further harmonious married life.

Held further – in respect of the issue of custody of the minor children, the social worker’s report is however clearly in favor of the fact that the court should grant custody to the plaintiff. The defendant further took no issue as to the plaintiff’s parenting skills and ability to look after the minor children. The defendant further submitted that she enjoyed unhindered access to the children while in the plaintiff’s custody.

Held further that – this court must weigh the parents' mental and physical conditions when determining custody. The court accepts that a bipolar parent should not automatically be barred from obtaining custody over a minor child, however in the matter *in casu*, there is nothing placed before court that it would be in the best interest of the children to award custody to the defendant, except for her word.

ORDER

1. Having heard the evidence adduced the court grants judgement in favor of the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before **31 July 2018**, following which to show cause to this: court on **28 August 2018** at **10:00**, why:

1.1 The bonds of marriage subsisting between the parties should not be dissolved.

1.2 An order in terms whereof custody and control of the minor children be awarded to the plaintiff subject to the defendant's rights of reasonable access.

1.3 Division of the joint estate.

2. The defendant's counter claim is dismissed.

3. No order as to costs is made.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff instituted divorce proceedings against the defendant, wherein the plaintiff claimed the following:

a) An order in terms whereof custody and control of the minor children be awarded to the plaintiff subject to the defendant's rights of reasonable access.

b) Division of the benefits of the marriage in community of property and without derogating therefrom, due regard being had to the various properties of the parties, that it specifically be ordered that:

- i. Ownership in respect of Erf no. 276, Tsumeb become vested in the plaintiff;
- ii. Ownership in respect of the Pick-up VW Amarok Truck motor vehicle, registration number N 12124 W become vested in the plaintiff; which constitutes N\$ 112 436.00 in monetary value (this amount is arrived at after deducting the loan due and payable over the motor vehicle);
- iii. Ownership in respect of the sedan Corolla Verso motor vehicle, registration number N 10926 WB become vested in the defendant;
- iv. Ownership in respect of the movable property listed in **EK** become vested in the defendant; and which constitutes N\$ 263 183.90 in monetary value (this monetary value is arrived at after deducting the loan due and payable over the motor vehicle)
- v. Erf no 473, no. 6 Meersig, Walvis Bay be sold and the proceeds thereof be equally divided between the parties.

[2] The defendant defended the action, raising a counterclaim on the following terms:

a) An order in terms whereof custody and control of the minor children be awarded to the defendant subject to the plaintiff's rights of reasonable access.

b) Defendant to retain the immovable property situated at Erf 473 no. 6 Meersig, Walvis Bay, Republic of Namibia as her sole and exclusive property subject to payment of the plaintiff's 50% in the said property to him.

c) The remainder of the assets (immovable and movable) in the joint estate to be sold and proceeds thereof to be shared equally between the parties.

[3] With the above, this court is then called upon to adjudicate on the following issues, namely:

a) The cause of the breakdown of the marriage;

b) Custody and control of the minor children;

c) The division of the joint estate.

Background facts

[4] Briefly, the parties were married in community of property on the 4th of March 2004 in Windhoek. Two children were born of the marriage and both children are attending primary school.

[5] The parties lived together from 2004 until January 2015, when the marriage between the parties deteriorated to such an extent that the plaintiff moved out of the common home.

[6] Seemingly, the marriage had issues as do all. According to the evidence of the plaintiff, their marriage was marred with incidences of emotional and psychological abuse going back as far as 2004. On two occasions the defendant resorted to using a knife against the plaintiff but luckily for all involved, the plaintiff did not sustain serious injuries. The couple's relationship was also fraught with distrust and accusations. Defendant alleged that the plaintiff involved himself in adulterous affairs with other women and she became so distrustful of the plaintiff that

the defendant would go out of her way to follow the plaintiff when he needed to travel for work.

[7] It would appear that the defendant had regular breakdowns which would lead to outburst of anger, quarreling and violent episodes. A diagnosis of Bipolar Disorder¹ followed after and the defendant was found in Hosea Kutako Avenue in Windhoek, walking around in the traffic, naked with a suitcase and the minor children, and there was also an issue that the defendant wanted to commit suicide. As the plaintiff was out of the country at the time, a good samaritan took charge of the defendant and the children and the defendant was admitted to hospital and subsequently treated.

[8] This occurrence was however not an isolated incident. It is the case of the plaintiff that the defendant has a relapse almost every year, during which periods, the defendant would become violent and abusive. As an example of this erratic behavior, the court was referred to what happened towards the end of November 2016, when the defendant threatened the tenants of their house in Walvis Bay with a knife and broke all the windows of the house in the presence of the Namibian Police.

[9] When the couple relocated from Luderitz to Walvis Bay in 2011 the plaintiff decided to seek marriage counselling from a professional therapist regarding the marital problems encountered. Initially the defendant was strongly opposed to the counselling but later attended same, however in spite of the best efforts of the parties, the counselling was not successful. During January 2015, the plaintiff moved out of the common home and into a flat. According to plaintiff, he moved out because the relationship between the couple deteriorated to the extent that it was impossible for him to remain in the house. The minor children were left in the care of the defendant at the time when the plaintiff moved out of the house.

[10] The conditions however became unacceptable for the minor children to remain with the defendant during 2016 and shortly after the incident in November

¹ Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks.

2016 the defendant was admitted to the psychiatric ward at Windhoek Central Hospital in terms of section 8 of the Mental Health Act² for treatment.

[11] On 9 January 2017, the plaintiff decided to obtain an interim protection order in terms of the Combating of Domestic Violence Act³ after several incidences and the fact that the defendant came to the plaintiff's flat and almost broke down the door. The interim protection order was subsequently made final during 2017. In terms of the protection order, temporary custody of the minor children was awarded to the plaintiff. The minor children are currently still residing with the plaintiff as their primary caretaker.

[12] Due to the deterioration of the relationship between the plaintiff and the defendant, the children were taken for therapeutic intervention by clinical psychologist, Lorraine Lacock, to assist the children in adjusting to the major shifts in the family dynamics. In this regard, the court was referred to a psychological report on the minor children and it would appear that the minor children are currently still in counselling but both the children are doing well and they have adapted to their current living environments. It was recommended that the minor children stay in the care of plaintiff. It was however further recommended that the relationship between the defendant and the children be supported and protected.

[13] As the primary caretaker of the family, plaintiff has steady employment, covering the needs of the family in general. Plaintiff maintains that he is able to care for the minor children financially and provide to the children the stability that they require. The defendant in turn is apparently self-employed but does not find herself in the same position as the plaintiff. She is just making ends meet but during the marriage, made contributions towards the upkeep of the family. Defendant was of the opinion that the minor children need their mother as they grow up and therefore the court should award her the custody of the children.

² Act 18 of 1973.

³ Act 4 of 2003.

Submissions by parties

[14] The plaintiff is of the view that the bipolar disorder renders the defendant mentally unstable if the defendant fails to take the medication prescribed regularly. The plaintiff further submits that the defendant has failed to take her medication on many occasions over a period of years because of either being in denial of her condition or upon accepting advice that she should not take medication to treat her condition.

[15] The plaintiff further submits that if the defendant fails to take her medication, which according to the treatment plan should be every day, she becomes irrational and further becomes emotionally, psychologically and physically abusive. The plaintiff further submits that her irrationality has once driven the defendant to sleep under a bridge and in some occasions, threatening and throwing a knife towards the plaintiff.

[16] The plaintiff further submits that as a result of the defendant's condition, the plaintiff took care of the minor children from a very early age and has been solely responsible for the family's finances and general upkeep.

Defendant's submissions

[17] The defendant submits that first and foremost, she respects and cannot deny the plaintiff's inherent right to liberty and pursuit of happiness and further refers to the plaintiff as her estranged husband or 'my lord'.

[18] The defendant further submits that although she is willing to defend the action on grounds of adultery and malicious desertion to prevent the divorce in its entirety, she elected not to. The defendant avers that the fact of the matter is that the plaintiff has been allegedly engaged in an adulterous relationship for over a period of 6 years with other women.

[19] The defendant further submits that the plaintiff is demeaning and of complete disregard towards her and is at all costs trying to demonstrate that she is mentally

unfit. Apart from the alleged tactics employed by the plaintiff, the defendant accepts responsibility for her dissociative experiences and submits that life affects everyone differently.

[20] The defendant further submits that the breakdown of the marriage started as soon the plaintiff allegedly started adulterous relationships with various women, one of which the defendant submits, the plaintiff fathered a child in respect of whom he paid or pays maintenance. The defendant further submits that one of the plaintiff's mistresses even came up to her and confronted her, telling her that the plaintiff and her will get married and that it is the will of God.

[21] Further, the defendant submits that she also contributed equally to the maintenance of the common home both financially and physically and that it was not only limited to the plaintiff. The defendant further in closing, prays for the court to grant an order for restitution, the division of the joint estate, and for the maintenance of both the defendant and the children as well as retaining the defendant and the children on the plaintiff's medical aid.

The welfare report

[22] A welfare report was prepared in this matter in determining the circumstances surrounding the welfare of the minor children. The report by the welfare officer briefly indicated that the defendant, despite various attempts, failed to participate in the drafting of the report and allegedly the defendant became very violent when the welfare officer tried explaining what the purpose of preparing the report was for.

[23] The welfare report's recommendation was that the children be placed in the custody and control of the plaintiff because it was in the best interest of the children to do so. This report seems to tie in with report from the clinical psychologist, Ms. Lacock and the recommendations are along the same lines.

The law applicable

[24] In order for a party to succeed in obtaining a restitution order, such party must prove the following:

‘[9] ‘Three things must be proved by a plaintiff in the preliminary proceedings for a restitution order: first that the court has jurisdiction; second that there has been and still is a marriage; and third, that there has been malicious desertion on the part of the defendant. The onus of proving both the factum of desertion and the *animus deserendi* rests throughout upon the plaintiff. The restitution order will not be made if after issue of summons the defendant returns or offers to return to the plaintiff, for in that case there is no longer desertion.’⁴

[25] It is common cause that the court has jurisdiction in this matter and that the parties were married and are still so married. It is clear that the main question which arises is whether the plaintiff has succeeded in discharging his onus of proving constructive desertion which would result in the granting of a restitution order.

[26] Although reference made by both parties on issues of infidelity, the action before me is not based on adultery but on constructive/malicious desertion.

[27] In the matter of *Mwira v Mwira (Born Gaeses)*⁵ Ueitele J discussed the issue of malicious desertion as follows:

‘[8] Malicious desertion is made up of two elements namely there must be the *factum* of desertion and secondly the defendant must have acted ‘*animo deserendi*’⁶. There are four forms of malicious home dangerous desertion in our law namely actual desertion, constructive desertion, refusal of marital privileges, and possibly, sentence of death or life imprisonment. Actual desertion is where one party actually leaves the matrimonial home with the intention not to return, constructive desertion, takes place when an innocent spouse leaves the matrimonial home, the defendant with the intent to bring the marital relationship to an end drives the plaintiff away by making life in the common or intolerable for him or her.

⁴ *Kagwe v Kagwe* an unreported judgment of this Court Case No (I 1459/2011) [2013] NAHCMD 71 (delivered on 30 January 2013).

⁵ (I 2354/2011) [2016] NAHCMD 299 (28 October 2016).

⁶ See Hahlo H R *The South African Law of Husband and Wife* 3rd Edition, Juta & Co Ltd 1969 at 387.

[9] Three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed:

- (a) The *consortium* of spouse must have come to an end as the result of the plaintiff having left the defendant;
- (b) it must have been the defendant's unlawful conduct that caused the plaintiff to leave;
- (c) the defendant's conduct must have been attributable to a fixed intention to put an end to the marriage.⁷

[28] What clearly emerged from the evidence before me is that the plaintiff was forced to move from the common home due to constant psychological relapses suffered by the defendant. During her episodes, defendant could become extremely violent, as is clear from the discussion above. What is of concern is that many of the incidents happened in front of the children and they witnessed this behavior.

[29] Plaintiff emphasized the fact that the defendant would at least once a year have a relapse in her condition as she fails to use her medication as prescribed. Plaintiff confirmed that the defendant's bipolar disorder can be managed effectively with ongoing professional treatment and provided she uses her medication and this was confirmed by the defendant. The defendant was however not in agreement with the frequency of relapses and stated since she accepted her condition, the relapses became fewer. However, during the course of the current proceedings, the defendant on her own version had a relapse and she stated that she was prepared to walk barefoot to wherever her husband was to go and apologize to him for what happened. During her recent relapse during March/April 2018 the defendant was treated by Dr. Mthoko at the Windhoek Central Hospital.

[30] On the issue of who is to blame for the current divorce proceedings, the defendant lays the blame for the breakdown of the marriage at the door of the

⁷ Supra at page 387 and the case *Voigts v Voigts* (I 1704/2009) [2013] NAHCMD 176 (24 June 2013) at 21.

plaintiff. She testified about his infidelity and also alleged that the plaintiff sired a child out of wedlock, which was denied by the plaintiff, stating that a paternity test was done and he was cleared from the allegation that he was the father of the said child. Defendant continued to make unsubstantiated allegations in this regard but at this point, I must add that the defendant's evidence lacked details and specifics in this regard. There was also an allegation of infidelity on the part of the defendant but the plaintiff did not pursue this issue at all.

[31] The defendant's cross-examination of the plaintiff and her subsequent evidence was at times incoherent and disjointed. During the course of the trial, the defendant fluctuated between overly emotional to a point of acceptance of what was said in court, just to become overly emotional again.

[32] However, what was attested to by the plaintiff with reference to the defendant's behavior stands largely unchallenged. Defendant however felt that the plaintiff was using her illness as a weapon to substantiate his action for divorce.

[33] It is also clear to me that, from the plaintiff's side, the marriage has 'irretrievably broken down' and that there are no reasonable prospects for the resumption of a joint and further harmonious married life. The defendant is having a hard time accepting this and it would also appear that she lost sight of the fact of how far her marriage was actually already on the rocks especially after the actual separation of the parties for more than two years already.

On the issue of custody of the minor children

[34] Defendant is insistent that the court should grant custody of the minor children to her and stated that the children need their mother.

[35] It should be noted though that the defendant does not take issue with the plaintiff's parenting skills and also confirms that she has free access to the minor children and at no stage did the plaintiff prevent her from seeing the children.

[36] The social worker's report is clearly in favor of the fact that the court should grant custody to the plaintiff.

[37] It is the merit of *Fletcher v Fletcher* 1948 (1) SA 130 (AD) as Centlivres JA (as he then was) at p 134 puts it, that what is really in issue in all custody cases – in the course of a matrimonial cause – is the interests of the child itself. Schreiner JA goes on to explain that the interest of the child is the main or paramount consideration or guiding principle⁸ to which the rights of the parties have to yield.⁹

[38] In this matter, the behavior of the defendant did in no terms assist her in the custody issue and this court is satisfied that the custody and control of the minor children should be awarded to the plaintiff, subject to the defendant's reasonable access. Joint custody would also not be reasonable especially in circumstances where the parties demonstrate such animosity against each other that they cannot live together, and often fight each other in opposed divorce litigation such as the current one.

[39] In *A v A* 2011 (1) NR 70 (HC), the court was of the opinion that the only possible instance where joint custody might work is where the minor children are old and mature enough to decide for themselves and the parents have a mature and responsible relationship to be able to take responsible decisions in the interest of the minor children. The court was further of the opinion that such situation would be very rare.

[40] Further, in *NS v PS* 2010 (2) NR 418 (HC) the court held the position that it is desirable that custody of relatively young children should be awarded to the mother. However, this rule is not inflexible. In summary, the court awarded the custody of two minor children, aged 7 and 10 years respectively, to the father. The reason for this award was that the father was better able to support the children financially and that he generally spent more time with them than did the mother. The defendant mother did not prove that she was in a position to do so.

⁸ At pg. 143.

⁹ See also *Gordon v Gordon* 1953 (2) SA 41 (W) at 49.

[41] Similarly, in the present matter, the plaintiff made sufficient averments to prove that he is in a better financial position to cater for the minor children. Although the plaintiff is in a better financial position than the defendant, it is not the 'be all and end all' of an enquiry as to what would be in the best interest of the children. Having regard to the discussion above relating to the fact that the defendant suffers from a bipolar disorder, it is an important factor to consider. In the event that the defendant suffers a relapse whilst the children are permanently in her custody, it can have dire consequence for the already fragile state of mind of the two children.

[42] The courts must weigh the parents' mental and physical conditions when determining custody. I accept that a bipolar parent should not automatically be barred from obtaining custody over a minor child, however in the matter *in casu*, I have nothing before me to set my mind at ease that it would be in the best interest of the children to award custody to the defendant, except for her word.

[43] The minor children are currently in a stable home environment with the plaintiff in spite of his travels and working hours. I am not convinced that the defendant has the same ability to maintain a stable home environment.

[44] It would therefore in my opinion, not be in the best interest of the minor children to grant custody to the defendant as prayed for. I will not interfere with the current status of the minor children and will thus order that the custody and control of the minor children be awarded to the plaintiff subject to the reasonable access of the defendant.

On the issue of division of the joint estate

[45] The principles relating to specific order being sought to the distribution of parties' assets by one party was clearly set out in the matter of *Carlos v Carlos; Lucian v Lucian*¹⁰ where the court found as follows:

¹⁰ *C v C; L v L* 2012 (1) NR 37 (HC).

[22.5] When the court deals with a request to issue a quantified or specific forfeiture order, it is necessary to provide evidence to the court as to the value of the estate at the date of the divorce. Similarly, evidence about all contributions of both spouses should be led. The fact that a husband or wife does not work, does not mean that he/she did not contribute. Value should be given to the maintenance provided to the children, household chores and the like. It would be readily quantifiable with reference to the reasonable costs which would have been incurred to hire a third party to do such work, had the spouse who provided the services, not been available during the marriage. Of course, he/she would then possibly have contributed more to the estate, but these difficulties must be determined on a case by case basis. Only in such circumstances can the forfeiture order be equitable.

[22.6] When a court considers a request to grant a quantified forfeiture order, evidence produced should include the value of the joint estate at the time of the divorce, the specific contributions made to the joint estate by each party, and all the relevant circumstances. The court will then determine the ratio of the portion each former spouse should receive with reference to their respective contributions. If the guilty spouse has only contributed 10% to the joint estate that is the percentage he or she receives. If, however, the 10% contributor is the innocent spouse, he or she still receives 50% of the joint estate. The same method as applied in the Gates' case should find application.'

[46] Evidence was led at trial as to the value of the joint estate and in respect of the value of the immovable property in Walvis Bay as well as the one in Tsumeb as well as estimation of the movable assets.

[47] It is the prayer of the plaintiff that a specified division should be made in respect of the vehicles and the other movable property and that the property in Tsumeb should remain in his possession whereas the property in Walvis Bay should be sold and proceeds should be divide between the parties.

[48] The defendant is opposed to the selling of the Walvis Bay property and prayed that she remains the sole owner of the property.

[49] It is common cause that Walvis Bay property still has a substantial mortgage bond outstanding on it and the defendant would not by any stretch of the imagination be able to take over the bond with her current income.

[50] Whereas both parties contributed to the joint estate and although there is no evidence of the value of those contributions made by the defendant there is nothing before this court to suggest that the property should not be equally divided amongst the parties. I therefor decline to award certain properties to the defendant and certain of those to the plaintiff based on property values and the extent of the value of their estate and therefore the joint estate should be divided equally.

[51] In order to give a complete coherent order, I here repeat the orders that I have granted:

1. Having heard the evidence adduced the court grants judgement in favor of the plaintiff for an order of restitution of conjugal rights and orders the defendant to return to or receive the plaintiff on or before **31 July 2018**, following which to show cause to this: court on **28 August 2018** at **10:00**, why:
 - 1.1 The bonds of marriage subsisting between the parties should not be dissolved.
 - 1.2 An order in terms whereof custody and control of the minor children be awarded to the plaintiff subject to the defendant's rights of reasonable access.
 - 1.3 Division of the joint estate.
2. The defendant's counterclaim is dismissed.
3. No order as to costs is made.

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

S Nambinga
of AngulaCo Inc. Windhoek

DEFENDANT:

In-Person